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No. 04-6432

In the Supreme Court of the United States

AURELIO O. GONZALEZ, PETITIONER

v.

JAMES V. CROSBY, JR., SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a motion for relief from judgment under Federal Rule of Civil Procedure 60(b) that seeks to reopen a federal court's final decision rejecting a habeas petitioner's challenge to a state criminal conviction constitutes a second or successive habeas corpus application, within the meaning of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

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INTEREST OF THE UNITED STATES

This case concerns whether and to what extent the limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, on the filing of second or successive federal habeas corpus applications apply to motions for relief from judgment under Federal Rule of Civil Procedure 60(b). The United States was a party to the consolidated en banc proceedings below. See *Lazo* v. *United States*, No. 02-12483; J.A. 29-32. Because AEDPA's limitations on second or successive habeas corpus applications generally apply to collateral review of federal criminal convictions under 28 U.S.C. 2255, see J.A. 35, the United States has a substantial interest in this case.

STATEMENT

1. a. Under 28 U.S.C. 2254, state prisoners may obtain collateral review of their criminal convictions by filing an application for a writ of habeas corpus in federal district court. Prisoners, however, must first exhaust available state court remedies. 28 U.S.C. 2254(b)(1)(A) and (c); see generally *Rhines* v. *Weber*, No. 03-9046 (Mar. 30, 2005). Title I of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1217, worked substantial changes in the availability of federal habeas corpus relief. See generally *Felker* v. *Turpin*, 518 U.S. 651, 656 (1996). Of relevance here, Section 106 of AEDPA (codified at 28 U.S.C. 2244) imposed strict constraints on the filing of repeat—second or successive—challenges to state convictions, creating a "modified res judicata rule" for federal habeas corpus proceedings. *Felker*, 518 U.S. at 664. Section 2244(b)(1) imposes an absolute bar on a habeas corpus application that raises claims that were already presented in a prior application. With respect to claims that were not presented in the initial application, Section 2244(b)(2) requires their dismissal unless the new claim "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," 28 U.S.C. 2244(b)(2)(A), or "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" and the facts underlying the claim could establish "by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense," 28 U.S.C. 2244(b)(2)(B)(i) and (ii).

AEDPA also imposed a one-year statute of limitations on filing applications for federal habeas corpus relief from state court convictions. See 28 U.S.C. 2244(d); *Pliler* v. *Ford*, 124 S. Ct. 2441, 2445 (2004); *Carey* v. *Saffold*, 536 U.S. 214, 220

(2002). Although there are limited exceptions, the time limit generally begins running at the conclusion of direct review of the criminal judgment. See 28 U.S.C. 2244(d)(1)(A). The running of the limitations period is tolled, however, during the pendency of "a properly filed application for State post-conviction or other collateral review." 28 U.S.C. 2244(d)(2).

b. Federal Rule of Civil Procedure 60(b) authorizes courts to relieve a party in civil litigation from a final judgment for six reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

2. a. In 1982, petitioner pleaded guilty in Florida state court to armed robbery, armed kidnapping, and armed burglary with a firearm. Pet. App. A4, at 2; J.A. 32.[1] He was sentenced to 99 years of imprisonment. J.A. 32. He did not appeal either the judgment of conviction or the sentence. *Ibid.* Fourteen years later, petitioner filed a collateral challenge to his conviction in Florida state court, see Fla. R. Crim. P. 3.850. J.A. 32. He alleged that newly discovered evidence demonstrated that his guilty plea was unknowing, unintelligent, and involuntary because counsel had advised

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[1] The court of appeals' decision mistakenly lists the year as 1992. The correct date is 1982. Pet. App. A4, at 2; Pet. Br. 2.

him that he would serve no more than 13 years. *Ibid.* The state court denied relief, and the court of appeals affirmed. *Ibid.*; *Gonzalez* v. *State*, 692 So. 2d 900 (Fla. 3d Dist. Ct. App. 1997) (Table).

b. In June 1997, petitioner filed an application for habeas corpus under 28 U.S.C. 2254, repeating his claim that his plea was involuntary and unknowing. Pet. App. A4; J.A. 32. Petitioner amended his application to add claims that the sentencing court relied upon incorrect criminal records and did not sign the sentencing order. Pet. App. A6, at 1.

The district court dismissed the application as time-barred under 28 U.S.C. 2244(d)(1). Because petitioner's conviction became final before AEDPA but his application for habeas corpus relief was filed after AEDPA's enactment, petitioner was afforded a one-year grace period—the one year following AEDPA's effective date of April 24, 1996—in which to pursue relief under 28 U.S.C. 2254. Pet. App. A7, at 2-3. Petitioner's application for federal habeas corpus, however, was not filed until two months after the grace period expired. *Gonzalez* v. *Secretary for the Dep't of Corrections*, 317 F.3d 1308, 1310 (11th Cir.), vacated for reh'g en banc, 326 F.3d 1175 (2003), on reh'g en banc, 366 F.3d 1253 (2004), cert. granted, 125 S. Ct. 961 (2005).

The district court initially granted petitioner a certificate of appealability, 28 U.S.C. 2253(c), but the court of appeals vacated the certificate and remanded for clarification because the district court had not specified which issues satisfied the statutory criteria for appealability, see 28 U.S.C. 2253(c)(3). See J.A. 32. On remand, the district court denied petitioner a certificate of appealability. *Ibid.* On April 6, 2000, a judge of the court of appeals also denied petitioner a certificate of appealability. *Ibid.*

c. Eleven days later, on April 17, 2000, this Court granted review in *Artuz* v. *Bennett*, No. 99-1238, to address the proper application of AEDPA's provision tolling the

limitations period during the pendency of state post-conviction proceedings. See 529 U.S. 1065. Nevertheless, petitioner did not seek this Court's review of the dismissal of his application for habeas corpus or the denial of a certificate of appealability.[2] On November 7, 2000, this Court issued its decision in *Artuz*, holding that the requirement in the tolling provision that the application for state post-conviction relief be "properly filed" is satisfied when the application "is delivered to, and accepted by, the appropriate court officer for placement into the official record." 531 U.S. 4, 8 (2000). The Court rejected the argument that an application seeking review of claims that are procedurally defaulted under state law is not "properly filed," reasoning that the propriety of a filing turns upon "applicable laws and rules governing" the "delivery and acceptance" of pleadings, and not whether the claims contained in the application "are meritorious and free of procedural bar." *Id.* at 8-9.

3. Eight months after this Court's decision in *Artuz*, petitioner filed a motion under Federal Rule of Civil Procedure 60(b) for relief from the judgment dismissing his federal habeas corpus application on statute of limitations grounds. J.A. 13-20. Petitioner contended that, under *Artuz*, his state collateral challenge was "properly filed" and therefore tolled the running of the AEDPA limitations period. J.A. 18-19. The district court denied petitioner's motion for relief under Rule 60(b), J.A. 21, and declined to issue a certificate of appealability, J.A. 33. A judge of the court of appeals subsequently granted a certificate of appealability "on the issue of

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[2] Petitioner could have filed a petition for a writ of certiorari asking the Court to hold the petition pending *Artuz*, or to grant review and hold that the certificate of appealability was improperly denied. See *Hohn* v. *United States*, 524 U.S. 236 (1998); Br. in Opp. 20 (listing cases where certiorari was granted to other prisoners denied certificates of appealability in cases implicating *Artuz*).

whether the district court's September 9, 1998 dismissal of [petitioner's] habeas petition was error." *Ibid.*

A panel of the court of appeals affirmed. *Gonzalez* v. *Secretary for the Dep't of Corrections*, *supra*. As an initial matter, the panel held that the certificate of appealability authorized appeal of an issue not properly before the court—the merits of the district court's 1998 dismissal of petitioner's Section 2254 application. The only issue on appeal, the panel explained, was the propriety of the district court's dismissal of Gonzalez's motion for relief under Rule 60(b). *Gonzalez*, 317 F.3d at 1310. The panel then held that a certificate of appealability would be required to appeal the denial of petitioner's Rule 60(b) motion. *Id.* at 1311-1312. In so ruling, the panel extended the court's earlier decision in *Lazo* v. *United States*, 314 F.3d 571 (11th Cir. 2002), vacated for reh'g en banc, 326 F.3d 1175 (2003), on reh'g en banc, 366 F.3d 1253 (2004), which had held that a certificate of appealability is required for a second or successive petition that is disguised as a Rule 60(b) motion—that is, a Rule 60(b) motion that directly attacks the underlying state court judgment of conviction rather than the district court's habeas decision. *Gonzalez*, 317 F.3d at 1311; see *Lazo*, 314 F.3d at 573. The panel concluded that the same requirement of a certificate of appealability should apply to Rule 60(b) motions that attack the merits of the federal court's habeas ruling. *Gonzalez*, 317 F.3d at 1312.

Finally, the panel denied petitioner a certificate of appealability. The panel did "not find it debatable among jurists of reason" that the denial of petitioner's Rule 60(b) motion was an abuse of discretion because, under circuit precedent, all Rule 60(b) motions were to be treated as second or successive petitions, and petitioner did not satisfy the statutory criteria for filing a second or successive application. *Gonzalez*, 317 F.3d at 1312 (citing *Mobley* v. *Head*, 306 F.3d 1096 (11th Cir. 2002), vacated for reh'g en banc, 326 F.3d 1175 (2003), on reh'g en banc, 366 F.3d 1253 (2004), cert. denied, 125 S. Ct. 965 (2005)). In addition, the panel concluded that, "even if pre-AEDPA law applied, it would still be clear that [petitioner's] Rule 60(b) motion was due to be denied." *Gonzalez*, 317 F.3d at 1312. The panel explained that "a change in the law standing alone was not a proper basis for Rule 60(b) relief absent extraordinary circumstances," and petitioner had failed to identify any such exceptional circumstances. *Ibid.* To the contrary, the court considered significant the "almost three year[]" time lag between the district court's denial of his habeas corpus application and the Rule 60(b) motion, because "[t]he longer the delay the more intrusive is the effort to upset the finality of the judgment." *Id.* at 1313 (quoting *Ritter* v. *Smith*, 811 F.2d 1398, 1402 (11th Cir.), cert. denied, 483 U.S. 1010 (1987)).

4. a. The court of appeals granted rehearing en banc, granted petitioner a certificate of appealability, and affirmed the district court's denial of his Rule 60(b) motion. J.A. 22-125. At the outset, the en banc court held that a certificate of appealability is required to appeal the dismissal of a Rule 60(b) motion in cases seeking review of both state convictions (under 28 U.S.C. 2254) and federal convictions (under 28 U.S.C. 2255). J.A. 36-43. The court granted petitioner a certificate of appealability because his underlying constitutional claim—that his guilty plea was neither knowing nor voluntary—was debatable among jurists of reason, and his challenge to the district court's dismissal of his habeas application on statute of limitations grounds was likewise reasonably debatable. J.A. 45-46.

With respect to the merits of the district court's denial of petitioner's motion, the court of appeals held that AEDPA "severely limit[s] the application of Rule 60(b) to habeas cases," J.A. 48, because AEDPA's "central purpose" was to enhance the finality of state and federal convictions and, to that end, to "greatly restrict the filing of second or succes-

sive petitions," J.A. 47. "Applying Rule 60(b) full throttle to final judgments in habeas cases," the court reasoned, "would essentially repeal the later-enacted AEDPA provisions." J.A. 49. The court accordingly held that Rule 60 motions are permissible only to correct clerical errors, Fed. R. Civ. P. 60(a), or to remedy fraud on the court, Fed. R. Civ. P. 60(b)(3). J.A. 63-64. In limiting Rule 60 motions to those two grounds, the court relied on *Calderon* v. *Thompson*, 523 U.S. 538 (1998), which had similarly limited a court's inherent authority to recall its mandate in habeas cases. See J.A. 58. Because Gonzalez's Rule 60 motion neither concerned clerical error or fraud nor satisfied the criteria for a second or successive petition, the court of appeals affirmed the district court's dismissal of the motion. J.A. 69-70.

b. With respect to the disposition of petitioner's case, Judge Tjoflat, joined by Judges Barkett and Wilson, dissented. J.A. 81-123, 124-125. The dissent would have held that AEDPA's limitations on second and successive filings do not apply because petitioner's Rule 60(b) motion did not directly attack the underlying state criminal conviction but, instead, focused on error allegedly committed in the federal proceedings. J.A. 99-101.

SUMMARY OF ARGUMENT

A central aim of AEDPA is to curtail serial federal court review of state-court convictions. To that end, AEDPA adopts a modified rule of res judicata for federal habeas judgments. The operation of Rule 60(b)'s general provisions for civil litigation must be subordinated to those specific statutory restrictions on second and successive applications for federal habeas corpus review. Any time a motion under Rule 60(b) seeks to reopen a prior habeas judgment either on the ground that the court committed legal error in holding that the prisoner's claims do not support federal relief or on the basis that new claims should be considered, the motion is

operating in territory covered by AEDPA, and Rule 60(b)'s more general provisions must give way. Even when a Rule 60(b) motion does not directly implicate AEDPA's terms, this Court's precedent makes clear that exercises of the courts' equitable discretion in habeas cases must be consonant with AEDPA's terms and purposes. Accordingly, federal habeas judgments should be reopened under Rule 60(b) only if there has been a substantial defect in the federal court's processes that goes to the integrity, fundamental reliability, and rudimentary fairness of the procedures by which the first habeas application was adjudicated. The type of error that may justify reopening, moreover, must not be so frequently occurring as to threaten, in practice, to circumvent AEDPA's constraints on federal review of criminal convictions.

Petitioner's Rule 60(b) motion is squarely foreclosed by AEDPA's categorical prohibition on applications that seek successive review of the same legal claims for relief, 28 U.S.C. 2244(b)(1). The district court has already held, as a matter of law, that petitioner's claims do not support federal relief from his conviction because they are barred by AEDPA's statute of limitations. That ruling was a final and dispositive determination that the claims presented in petitioner's habeas application do not support federal relief, and that judgment is fully subject to AEDPA's res judicata rules. Petitioner's argument that the case should be reopened—not because he is innocent and not because of any fundamental failure in the federal court's adjudicatory processes, but because the federal court allegedly made a mistake of law in applying AEDPA's limits on habeas review —represents precisely the type of reiterated review of habeas judgments that AEDPA proscribes.

There is no merit to petitioner's argument that the Due Process Clause of the Fifth Amendment and the Constitution's limitations on suspension of the writ of habeas corpus,

U.S. Const. Art. I, § 9, Cl. 2, compel reconsideration of his claims. Statutes of limitations, procedural default rules, and limitations on the retroactive application of constitutional rulings to cases on collateral review have long been applied by federal courts in habeas cases without constitutional incident. The privilege of seeking habeas relief is not a guarantee that all claims will be decided on their own terms or that all of the habeas court's rulings will be error free.

Finally, even if petitioner's Rule 60(b) motion were found not to be subject to AEDPA, the court of appeals' judgment should be affirmed. Intervening changes of law support relief under Rule 60(b) only in the most extraordinary circumstances, and they almost never should do so in habeas cases where they fail to satisfy AEDPA's specific provision regulating the consideration of certain new rules of constitutional law, 28 U.S.C. 2244(b)(2)(A). In this case, there are no extraordinary or extenuating circumstances that warrant relief. Indeed, when the federal court issued the habeas judgment of which he now complains, petitioner failed to seek this Court's review of that decision, even though the Court was actively considering the legal basis for that adverse judgment at the time. Rule 60(b) does not offer relief for parties who default on the normal avenues of appellate review.

ARGUMENT

A MOTION UNDER FEDERAL RULE OF CIVIL PROCEDURE 60(B) IS SUBJECT TO AEDPA'S LIMITATIONS ON SECOND AND SUCCESSIVE APPLICATIONS FOR HABEAS CORPUS IF THE MOTION CHALLENGES THE DISTRICT COURT'S HOLDING THAT FEDERAL RELIEF FROM THE CONVICTION IS UNAVAILABLE

A. AEDPA's Restrictions On Federal Court Review Of Second And Successive Applications Sharply Constrain Rule 60(b)'s Operation In Habeas Corpus Cases

1. Federal Rule of Civil Procedure 60(b) is a general rule embodying the courts' traditional authority to afford relief from their judgments, and it broadly governs most forms of civil litigation in the federal courts. See Fed. R. Civ. P. 81; *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 233-234 (1995). The Rule's operation, however, is subject to more specific limitations imposed by legislation. In particular, the Federal Rules of Civil Procedure expressly provide that they apply to habeas corpus proceedings only "to the extent that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings." Fed. R. Civ. P. 81(a)(2). Accordingly, where the practice for habeas corpus proceedings is set forth by statute, that practice "takes precedence over the Federal Rules." *Browder* v. *Director, Dep't of Corrections*, 434 U.S. 257, 269 n.14 (1978).[3]

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[3] See *Woodford* v. *Garceau*, 538 U.S. 202, 208 (2003); *Pitchess* v. *Davis*, 421 U.S. 482, 489 (1975) ("Since the exhaustion [of state remedies] requirement is statutorily codified [under Section 2254], even if Rule 60(b) could be read to apply to this situation it could not alter the statutory command."); Rule 11 of the Rules Governing Section 2254 Cases (the Federal Rules of Civil Procedure apply to Section 2254 cases only if "they

"The enactment of AEDPA in 1996 dramatically altered the landscape for federal habeas corpus petitions." *Rhines* v. *Weber*, No. 03-9046 (Mar. 30, 2005), slip op. 4. In AEDPA, Congress strictly limited the federal courts' authority to revisit the denial of an application for habeas relief. If a habeas corpus applicant files a successive application asking a federal court to reconsider granting relief on grounds that were already "presented in a prior application," 28 U.S.C. 2244(b)(1), AEDPA unconditionally commands dismissal. AEDPA also places significant limits on the consideration of new claims not previously presented to the federal court. In that setting, the application can be entertained only if it relies on a new rule of constitutional law that this Court has made applicable to cases on collateral review or on newly discovered evidence clearly demonstrating actual innocence. 28 U.S.C. 2244(b)(2).

Section 2244(b)'s strict limitations on second and successive claims are "grounded in respect for the finality of criminal judgments," and reflect "AEDPA's central concern that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence." *Calderon* v. *Thompson*, 523 U.S. 538, 558 (1998). Congress recognized the "profound societal costs that attend the exercise of habeas jurisdiction." *Id.* at 554 (quoting *Smith* v. *Murray*, 477 U.S. 527, 539 (1986)). Indeed, "[f]inality is essential to both the retributive and the deterrent functions of criminal law." *Calderon*, 523 U.S. at 555. "Perpetual disrespect for the finality of convictions disparages the entire criminal justice system." *McCleskey* v. *Zant*, 499 U.S. 467, 492 (1991). Serial review denies closure for the victims, the public, and the government; discourages those convicted of crime from accepting responsibility for their crimes; and deprives the criminal law of the retributive certainty that is essential to its deterrent and punitive effect. See *id.* at 491; *Teague* v. *Lane*, 489 U.S. 288, 309 (1989) (plurality opinion) ("Without finality, the criminal law is deprived of much of its deterrent effect."). In addition, the more prolonged the review process, the greater the risk that the passage of time will preclude any retrial of the defendant and thus, "in practice," will "reward the accused with complete freedom from prosecution." *Engle* v. *Isaac*, 456 U.S. 107, 128 (1982). Repeated habeas corpus filings also consume significant governmental resources, with sharply diminishing returns in the vindication of fundamental constitutional rights or the protection of the innocent.

When state convictions are challenged on federal habeas review, enforcing finality rules and limiting federal court oversight "preserve[s] the federal balance" by respecting the States' "good-faith attempts to honor constitutional rights," as well as their "sovereign power to punish offenders." *Calderon*, 523 U.S. at 555-556 (quoting *Murray* v. *Carrier*, 477 U.S. 478, 487 (1986)). AEDPA's limitations on repetitive and piecemeal attacks on criminal convictions thus "further the principles of comity, finality, and federalism." *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000); see *McCleskey*, 499 U.S. at 491 ("Finality has special importance in the context of a federal attack on a state conviction.").

Accordingly, to the extent that a motion under Rule 60(b) operates in territory covered by AEDPA—*i.e.*, it seeks either reconsideration of the court's holding that claims previously presented are insufficient to support federal relief or the consideration of new claims or new evidence—AEDPA supplants Rule 60(b), and further federal review is permissible only on AEDPA's terms. To hold otherwise would circumvent AEDPA's restrictions on relitigation. Indeed, for that same reason, this Court held that a prisoner's motion to recall a court of appeals' mandate on the basis of the merits

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are not inconsistent with any statutory provisions"); Rule 12 of the Rules Governing Section 2255 Cases (same, for actions under 28 U.S.C. 2255).

of the underlying decision in a Section 2254 case must be treated as a second or successive habeas corpus application. "Otherwise, petitioners could evade the bar against relitigation of claims presented in a prior application, § 2244(b)(1), or the bar against litigation of claims not presented in a prior application, § 2244(b)(2)." *Calderon*, 523 U.S. at 553.[4]

The fact that the narrow "claim" presented in the Rule 60(b) motion does not itself attack the underlying state conviction does not lessen the threatened inroads on finality. *Calderon* made clear that AEDPA is concerned with whether the ultimate object of the application is to obtain another round of federal review of the criminal conviction, not with the formal procedural device employed. 523 U.S. at 553; cf. *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000) (to obtain certificate of appealability for alleged error in a procedural ruling, prisoner must show that reasonable jurists could disagree not only about the procedural judgment, but also, if the procedural ruling is overturned, about whether the petition states a valid claim of a denial of a constitutional right). In sum, a Rule 60(b) attack on a federal habeas court's reason for denying relief—whether the reason was based on a constitutional ruling or a holding of procedural default, nonretroactivity, or a statute of limitations bar—falls within the

[4] Even before AEDPA, courts of appeals recognized that Rule 60(b) motions in habeas cases should be subject to judicially prescribed limitations on second or successive petitions. See, *e.g.*, *Hunt* v. *Nuth*, 57 F.3d 1327, 1339-1340 (4th Cir. 1995), cert. denied, 516 U.S. 1054 (1996); *Behringer* v. *Johnson*, 75 F.3d 189, 190 (5th Cir.), cert. denied, 516 U.S. 1182 (1996); *Graham* v. *United States*, 72 F.3d 129 (6th Cir. 1995) (Table); *Guinan* v. *Delo*, 5 F.3d 313, 316 (8th Cir. 1993); *Bonin* v. *Calderon*, 59 F.3d 815, 847 (9th Cir. 1995), cert. denied, 516 U.S. 1051 (1996); *Scott* v. *Singletary*, 38 F.3d 1547, 1553 (11th Cir. 1994), cert. denied, 515 U.S. 1145 (1995); see also *Barrett* v. *United States*, 965 F.2d 1184, 1188 n.7 (1st Cir. 1992) (dicta); *Landano* v. *Rafferty*, 897 F.2d 661, 668 n.10 (3d Cir.), cert. denied, 498 U.S. 811 (1990).

scope of AEDPA. Accordingly, it must meet the standards and comply with the procedures governing a second or successive motion under AEDPA.

2. Petitioner contends (Br. 14-18) that Rule 60(b) has equivalent status to duly enacted legislation and thus that courts must strain to read AEDPA's restrictions on federal review in a way that preserves Rule 60(b)'s uncabined reach. That position is not sustainable. Unlike some other federal rules, Rule 60 has not been enacted into positive law.[5] AEDPA, in contrast, represents a comprehensive statutory revision of habeas practice and "greatly restricts the power of federal courts to award relief to state prisoners who file second or successive habeas corpus applications." *Tyler* v. *Cain*, 533 U.S. 656, 661 (2001). As a result, when a Rule 60(b) motion operates within AEDPA's realm—by seeking either to relitigate claims previously presented or to raise new claims—Rule 60(b)'s general provisions must yield to AEDPA's statutory limitations on serial habeas litigation.

Even if a particular application of Rule 60(b) would "not contravene the letter of AEDPA," federal courts must always exercise their discretion to extend collateral review of criminal convictions in a manner that is "consistent with the objects of [AEDPA]," and the larger societal interests in finality and closure. *Calderon*, 523 U.S. at 554; see *Rhines*, slip op. 5-6 (even though "AEDPA does not deprive district courts of th[e] authority" to grant stays, "it does circumscribe their discretion," which must be exercised in a manner "compatible with AEDPA's purposes"); *Felker* v. *Turpin*, 518 U.S. 651, 663 (1996) (AEDPA "inform[s]" exercise of this Court's original habeas jurisdiction even if it does not directly regulate it). The courts' discretion to grant re-

[5] See *United States* v. *Sells Eng'g, Inc.*, 463 U.S. 418, 438 (1983) (Federal Rule of Criminal Procedure 6(e), which governs grand jury secrecy, has been enacted into positive law).

lief under Rule 60(b) already is limited to "extraordinary circumstances." *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988) (quoting *Ackerman* v. *United States*, 340 U.S. 193, 199 (1950)). But because Rule 60(b) motions in Section 2254 and Section 2255 cases almost invariably implicate Congress's interest in constraining serial federal review of criminal convictions, a prisoner must show more than just the usual "extraordinary" grounds for relief. He must also demonstrate that further review would not frustrate the finality, comity, and federalism purposes advanced by AEDPA.

As a general rule, that will occur only when the Rule 60(b) motion exposes a substantial defect in the court's processes that goes to the integrity, fundamental reliability, and rudimentary fairness of the procedures by which his first application was adjudicated. See pp. 24-28, *infra*. The type of error asserted, moreover, must be so infrequently occurring as not to threaten, in practice, to circumvent AEDPA's constraints on federal review of criminal convictions. For example, Rule 60(b) relief should remain available in Section 2254 and Section 2255 cases where fraud or a similar type of substantial defect in the court's adjudicatory processes pervaded and indelibly tainted the initial habeas proceedings, "calling into question the very legitimacy" and integrity of the judgment, *Calderon*, 523 U.S. at 557. But to allow federal re-review based on alleged legal or factual flaws in the merits of the district court's conclusion that federal habeas relief should be denied (i) would fail to respect Congress's determination, in AEDPA, that serial federal review of the same conviction should be strictly circumscribed, (ii) would ignore the principle that Rule 60(b) relief is supposed to be extraordinary and exceptional because of the need for stability and finality in judgments, and (iii) would disregard the profound costs to society, the justice system, and the effectiveness of the penal laws occasioned by the

multiplicitous relitigation on habeas of challenges to criminal convictions.

B. Petitioner's Rule 60(b) Motion Is A Prohibited Successive Habeas Application Because Petitioner Seeks To Relitigate Claims That The District Court Already Held Do Not Support Federal Relief Under Section 2254

1. A dismissal on statute of limitations grounds is a judgment on the merits that triggers AEDPA's limitations

Petitioner's Rule 60(b) motion does not present the type of extraordinary defect in the functioning of the federal court in the first habeas proceeding that can support another round of federal review of his state conviction "consistent with the objects of [AEDPA]." *Calderon*, 523 U.S. at 554. Quite the opposite, petitioner's motion simply asks the district court to reconsider its rejection of the claims made in his first application for habeas relief on the ground that the court committed error in finding that the claims were time-barred. The only justification advanced for doing so is not extraordinary; it is the quite ordinary argument that the court made a mistake of law. But that contention cannot obscure the fact that petitioner is still seeking relief based on the same claims—the alleged involuntariness of his plea and errors in his criminal history—and that he is protesting the habeas court's legal basis for rejecting them. Petitioner can no more resurrect those claims through a Rule 60(b) motion than he could through the filing of a new habeas application, which would unquestionably be barred as successive.

The essence of petitioner's argument is that the prior federal court denial of relief does not count—for purposes of characterizing the Rule 60(b) motion as successive—because the court denied relief on statute of limitations grounds. But statute of limitations rulings are an integral part of deter-

mining whether the claims presented support *federal* habeas relief from a state conviction. Judicially crafted limitations on federal review—such as procedural default rules, limitations on collateral review of Fourth Amendment claims, see *Stone* v. *Powell*, 428 U.S. 465 (1976), and the non-retroactivity doctrine, see *Teague* v. *Lane*, *supra*—may often conclusively bar federal relief from a conviction. The denial of habeas relief on such grounds constitutes the same type of final resolution of a petitioner's claim to federal relief as dismissals that rely upon the construction of particular provisions of the Bill of Rights. In short, "[t]he 'merits' of a claim are disposed of when it is refused enforcement," and "[a]n adjudication declining to reach such ultimate substantive issues may bar a second attempt to reach them in another court" as much as their actual decision. *Angel* v. *Bullington*, 330 U.S. 183, 190 (1947); see *Artuz*, 531 U.S. at 8-9 (equating a procedural bar determination with substantive consideration of the merits of a claim).

Indeed, the Federal Rules of Civil Procedure accord judgments based on statute of limitations grounds the same status and effect as other dispositions on the merits. See Fed. R. Civ. P. 41(b) ("Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."). This Court, as well, has long recognized that denials of relief on statute of limitations grounds constitute final judgments on the merits and are entitled to res judicata effect. See *Plaut*, 514 U.S. at 228 ("The rules of finality, both statutory and judge made, treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute: as a

judgment on the merits.").[6] No different rule applies in criminal cases.[7]

Furthermore, Section 2244's "modified res judicata rule," *Felker*, 518 U.S. at 664, does not turn on the legal basis for disposing of the case in the first round of collateral review. To the contrary, the statute turns solely on whether the claim for relief from the criminal conviction "was presented" in the prior application, in which case dismissal is mandatory, 28 U.S.C. 2244(b)(1), or "was not presented," in which case dismissal is mandatory unless the new claim falls within the

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[6] See also *United States* v. *Oregon Lumber Co.*, 260 U.S. 290, 299-300 (1922) ("The defense of the statute of limitations is not a technical defense but substantial and meritorious," and "a decree dismissing a bill on the ground of lapse of time [is] a judgment upon the merits."). The courts of appeals are in accord. See, *e.g.*, *Ortiz-Cameron* v. *DEA*, 139 F.3d 4, 6 (1st Cir. 1998); *AmBase Corp.* v. *City Investing Co.*, 326 F.3d 63, 72 (2d Cir.), cert. denied, 540 U.S. 1017 (2003); *Witkowski* v. *Welch*, 173 F.3d 192, 200 (3d Cir. 1999); *Shoup* v. *Bell & Howell Co.*, 872 F.2d 1178, 1179 (4th Cir. 1989); *United States* v. *Land*, 213 F.3d 830, 834 (5th Cir. 2000), cert. denied, 532 U.S. 904 (2001); *Mitchell* v. *Chapman*, 343 F.3d 811, 820 (6th Cir. 2003), cert. denied, 124 S. Ct. 2908 (2004); *Reinke* v. *Boden*, 45 F.3d 166, 168 (7th Cir.), cert. denied, 516 U.S. 817 (1995); *Hillary* v. *TWA*, 123 F.3d 1041, 1044 (8th Cir. 1997), cert. denied, 522 U.S. 1090 (1998); *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1081 (9th Cir. 2003); *Murphy* v. *Klein Tools, Inc.*, 935 F.2d 1127, 1128-1129 (10th Cir.), cert. denied, 502 U.S. 952 (1991); *Murphy* v. *United States*, No. 99-5325, 2000 WL 274200, at *1 (D.C. Cir. Feb. 2, 2000), cert. denied, 530 U.S. 1248 (2000); *North Georgia Elec. Membership Corp.* v. *City of Calhoun*, 989 F.2d 429, 433 (11th Cir. 1993).

[7] See *United States* v. *Oppenheimer*, 242 U.S. 85, 87-88 (1916) ("[A] judgment for the defendant upon the ground that the prosecution is barred goes to his liability as matter of substantive law and one judgment that he is free as matter of substantive law is as good as another. A plea of the statute of limitations is a plea to the merits."); *United States* v. *Barber*, 219 U.S. 72, 78 (1911) ("[T]he plea of the statute of limitation * * * is directed to the merits of the case; and if found in favor of the defendant the judgment is necessarily an acquittal of the defendant of the charge, and not a mere abatement of the action.") (citation omitted).

narrowly prescribed exceptions for intervening rules of constitutional law or new evidence of actual innocence, 28 U.S.C. 2244(b)(2). Indeed, AEDPA *deleted* language from the predecessor version of Section 2244(b) that defined second and successive writs by considering whether there was "a hearing on the merits of an issue of law" that was actually "adjudicated." 28 U.S.C. 2244(b) (1994). Respondent's argument thus attempts to resuscitate statutory language that Congress specifically discarded.[8]

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[8] This Court's decisions in *Slack* v. *McDaniel*, *supra*, and *Stewart* v. *Martinez-Villareal*, 523 U.S. 637 (1998), determined that a final dismissal with prejudice, not just presentation of the claim, is necessary before court-made or pre-AEDPA statutory limitations on subsequent applications for relief attach. *Slack*, 529 U.S. at 485-488 (dismissal without prejudice on exhaustion grounds does not trigger limits on subsequent petitions under pre-AEDPA law); *Stewart*, 523 U.S. at 643-644 (same, for dismissal without prejudice on ripeness grounds). In such circumstances, the Court concluded that the return to federal court functions effectively as a continuation of the original proceeding for relief, because the federal court never actually determined whether the claims presented would support federal relief from the conviction. *Slack*, 529 U.S. at 486 (at time of return to federal court, the viability of the claims as a basis for relief from the conviction "was unadjudicated on its merits"); *Stewart*, 523 U.S. at 643 (where prisoner returned to federal court after a dismissal without prejudice of claims based on ripeness grounds, there still "was only one application for habeas relief"). Indeed, the dismissal in each case, by its terms, "contemplated that the prisoner could return to federal court," *Slack*, 529 U.S. at 486; see *Stewart*, 523 U.S. at 640, and the Court stressed in *Stewart* that "[i]t is certain" that Martinez-Villareal's claim "would not be barred under any form of res judicata," 523 U.S. at 645. See also *Lebron-Rios* v. *United States Marshal Serv.*, 341 F.3d 7, 13 (1st Cir. 2003) (res judicata does not attach to dismissal without prejudice on exhaustion grounds); see generally *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 396 (1990) (dismissal without prejudice lacks res judicata effect). A dismissal with prejudice on statute of limitations grounds, by contrast, constitutes a final and dispositive adjudication on the merits of the question whether the claims presented support federal relief; res judicata attaches; and no later return to or revival of the claims in federal court is contemplated.

The costs of allowing repetitive litigation to the State, victims, courts, and society—*i.e.*, upsetting the finality of penal judgments, the danger that delayed relief will thwart retrial, and the resource drain on the courts—are exactly the same regardless of whether the first application was held insufficient on statute of limitations or constitutional grounds. When, as here, "lengthy federal proceedings have run their course and a mandate denying relief has issued," the "State's interests in finality are all but paramount." *Calderon*, 523 U.S. at 556, 557. At that point, unsettling longstanding and already repeatedly scrutinized criminal convictions "inflict[s] a profound injury to the 'powerful and legitimate interest in punishing the guilty,' * * * an interest shared by the State and the victims of crime alike." *Id.* at 556 (quoting *Herrera* v. *Collins*, 506 U.S. 390, 421 (1993)). Thus, both AEDPA's text and its animating purposes dictate that dismissal of an initial Section 2254 application on statute of limitations grounds—a merits-based judgment that the claims presented do not warrant federal relief—triggers Section 2244's restrictions on second or successive filings.[9]

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[9] See *Murray* v. *Greiner*, 394 F.3d 78, 81 (2d Cir. 2005) ("We hold that dismissal of a § 2254 petition for failure to comply with the one-year statute of limitations constitutes an adjudication on the merits that renders future petitions under § 2254 challenging the same conviction 'second or successive' petitions under § 2244(b)."); *Altman* v. *Benik*, 337 F.3d 764, 766-767 (7th Cir. 2003) (same, for Section 2255); *United States* v. *Clark*, 203 F.3d 358, 370 n.13 (5th Cir. 2000) (describing a dismissal of a Section 2254 petition on statute of limitations grounds as a disposition on the merits), vacated on other grounds, 532 U.S. 1005 (2001); cf. *Henderson* v. *Lampert*, 396 F.3d 1049, 1053 (9th Cir. 2005) (procedural default ruling should be treated as a ruling on the merits for purposes of Section 2244(b)); *In re Abdur'Rahman*, 392 F.3d 174, 188-189 (6th Cir. 2004) (en banc) (Siler, J., dissenting) (same), petition for cert. pending, No. 04-1247

2. *An alleged mistake of law does not preclude operation of Section 2244(b)'s limitations on second or successive habeas applications*

Petitioner argues (Br. 25-38) that precluding relief under Rule 60(b) from the district court's denial of his first habeas application on statute-of-limitations grounds would violate the Due Process Clause of the Fifth Amendment and the Constitution's Suspension Clause, which petitioner reads (Br. 36) as mandating an actual "determination of the claims asserted."[10] But, if accepted, petitioner's argument would preclude the application of any statute of limitations to federal habeas corpus actions because any enforcement of that limitations period necessarily would entail disposing of the petition without determining the merits of the underlying constitutional claims. Furthermore, long before AEDPA, federal courts refused to decide the constitutional claims raised in a habeas petition if the prisoner procedurally defaulted those claims in state court, unless the prisoner also demonstrated cause and prejudice for the failure to press the issue.[11] Surely the Suspension Clause does not proscribe this Court's longstanding procedural default rules. There simply is no constitutional principle entitling every federal habeas corpus applicant to have every federal constitutional claim decided on its own terms at least once.

(filed Mar. 11, 2005); *Harvey* v. *Horan*, 278 F.3d 370, 379-380 (4th Cir. 2002) (same); *In re Cook*, 215 F.3d 606, 608 (6th Cir. 2000) (same); *Carter* v. *United States*, 150 F.3d 202, 205-206 (2d Cir. 1998) (same).

[10] The Due Process Clause provides that "[n]o person shall * * * be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V. The Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. Art. I, § 9, Cl. 2.

[11] See, *e.g.*, *Wainwright* v. *Sykes*, 433 U.S. 72, 87-90 (1977); *Ex parte Spencer*, 228 U.S. 652, 660-661 (1913).

Petitioner's contention (Br. 36-39) that the district court made a statutory construction error in denying relief does not change the constitutional equation. That circumstance, if given decisive significance, would constitutionalize every alleged misinterpretation of a limitations period and every debatable exhaustion ruling in federal habeas proceedings. See 28 U.S.C. 2244(d), 2254(b). Presumably, the same logic would extend to any error in applying the procedural default doctrine. Whatever else they may guarantee, neither the Suspension Clause nor the Due Process Clause is an insurance policy against legal error in adjudicating a habeas case.[12]

The writ of habeas corpus does not even serve as a guarantee against error in the original criminal case. The central lesson of *Teague* v. *Lane*, *supra*, is that "the purpose for which the writ of habeas corpus is made available" is to ensure the faithful application of the law "that prevailed at the time the original proceedings took place," 489 U.S. at 306 (plurality opinion), "not to provide a mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine," *Sawyer* v. *Smith*, 497 U.S. 227, 234 (1990).[13] And Congress has pursued the same policy in

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[12] That is especially true in light of the fact that the Great Writ did not even extend to prisoners (like petitioner) detained under state law until nearly 100 years after the Constitution was adopted, see, *e.g.*, *McCleskey*, 499 U.S. at 478, and this Court's endorsement of constitutional challenges to state convictions on habeas did not emerge until the middle of the 20th century, *Felker*, 518 U.S. at 663. Indeed, this Court has "assume[d]" the applicability of the Suspension Clause to the current scope of the writ, *id.* at 663-664, but has not yet so held.

[13] See also *Tyler* v. *Cain*, *supra* (federal habeas relief unavailable for unconstitutional jury instruction); *Kuhlmann* v. *Wilson*, 477 U.S. 436, 448 n.8 (1986) (opinion of Powell, J.) (the scope of federal habeas jurisdiction involves "balancing competing interests" and thus sometimes withholds relief for constitutional claims "whether or not those claims are meritorious").

AEDPA by restricting federal habeas relief for a claim decided in state court to decisions that are contrary to, or an unreasonable application of, this Court's decisions at the time of the state court ruling, or that are based on an unreasonable determination of the facts. See 28 U.S.C. 2254(d). Under that standard, error alone is not enough to obtain relief. See, *e.g.*, *Williams* v. *Taylor*, 529 U.S. 362, 402-413 (2000); cf. *Brown* v. *Payton*, No. 03-1039, 2005 WL 645182, at *11 (Mar. 22, 2005) (Breyer, J., concurring) (recognizing Congress's direction "to defer to the reasonable conclusions of state-court judges" even if the state decision "likely" involved error).

Thus, neither the Suspension Clause nor the Due Process Clause is violated by tolerating legal error in the initial criminal trial or in the subsequent resolution of constitutional claims in state habeas proceedings. It follows that there is no sound reason for concluding that those provisions are violated by declining to remedy a belatedly exposed statutory-construction error in federal habeas review.

3. The court of appeals' test, limiting Rule 60(b) to instances of fraud and clerical error, is unduly narrow

a. In affirming the district court's judgment refusing Rule 60(b) relief, the court of appeals held that the availability of relief under Rule 60(b) turns exclusively on whether the prisoner's motion is based on clerical error or fraud in the habeas proceeding. J.A. 63-64. While the court of appeals' judgment is correct, its categorical prohibition on all other grounds for relief under Rule 60(b) goes too far. The correct test for determining whether a Rule 60(b) motion qualifies as a second or successive petition is whether the motion challenges the correctness of the underlying federal court judgment that the claims presented do not support habeas relief or seeks to obtain relief on the basis of new legal claims or new evidence. If the motion does so, it operates in

territory covered by AEDPA's modified res judicata rules and can proceed, if at all, only on AEDPA's terms. On the other hand, if the motion seeks relief predicated on the basis of an exceptional defect in the federal court's adjudicatory processes—an error that reflects a breakdown in the ordinary functioning of the court system, such that the initial judgment denying relief cannot be trusted or the prisoner otherwise did not receive a full and fair determination of whether his claims provide a basis for federal relief—then the Rule 60(b) motion does not trench upon either AEDPA's text or its purposes, and it can be resolved as an ordinary Rule 60(b) motion. Fraud generally will qualify as the type of fundamental defect in the federal court's proceedings that remains an appropriate subject for relief under Rule 60(b), because a Rule 60(b) motion based on fraud ordinarily does not directly implicate AEDPA's res judicata rule.[14] Res judicata historically has not attached to judgments procured through fraud, and neither the government nor the public has a legitimate interest in preserving the finality or durability of such judgments.[15]

But fraud is not the only type of non-clerical error that can occur in habeas cases and that falls outside of AEDPA's reach. For example, relief under Rule 60(b) may also be consonant with AEDPA where the court or the government failed to serve the prisoner with notice at a critical stage of the initial habeas proceeding and the prisoner, with

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[14] The fraud must be based on a claim of serious perversion of the habeas court's own processes, cf. *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 245 (1944), not a recycled allegation of a violation of disclosure duties in the underlying criminal case that the State allegedly failed to cure. A mere claim of a continuing violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), will not constitute a valid Rule 60(b) claim. See *Alley* v. *Bell*, 392 F.3d 822, 831 (6th Cir. 2004).

[15] See, *e.g.*, *United States* v. *Beggerly*, 524 U.S. 38, 47 (1998); *Marshall* v. *Holmes*, 141 U.S. 589, 599-600 (1891).

diligence, could not have cured that defect independently, with the result that the prisoner was effectively deprived of his full statutory right to review under Section 2254 or Section 2255. See *Rodwell* v. *Pepe*, 324 F.3d 66, 70 (1st Cir.) (dicta), cert. denied, 540 U.S. 873 (2003). Relief would also be appropriate if there were an error in the execution of the judgment. See *United States* v. *Phillips*, 225 F.3d 1198, 1201 (11th Cir. 2000) (relief under Rule 60(b) granted where a technical error in remedy ordered by the court had previously denied the prisoner his right to appeal).[16] In short, in the wake of AEDPA, relief should remain available for Rule 60(b) motions that attack a fundamental irregularity in the procurement or integrity of the initial habeas judgment, but not for those that simply attack the correctness of the court's ultimate ruling. The latter ground is fully addressed and occupied by AEDPA.[17]

b. Petitioner (Br. 18-21), like the dissent below (J.A. 99-100), argues that the dividing line between Rule 60(b) motions subject to AEDPA and those that are not should be drawn based on whether the motion focuses on error in the

[16] Because Congress expressly provided that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under Section 2254," 28 U.S.C. 2254(i), similar missteps by counsel should not provide a basis for relief under Rule 60(b) either. Cf. *Coleman* v. *Thompson*, 501 U.S. 722 (1991).

[17] The court of appeals relied (J.A. 58) on this Court's decision in *Calderon*, which limited motions to recall the mandate in habeas cases to instances of fraud and clerical error, 523 U.S. at 557. *Calderon*, however, did not involve a prisoner's independent effort to obtain further judicial review of his conviction; it addressed a court's inherent authority, *sua sponte*, to recall its own mandate, a practice that is not directly regulated by AEDPA. See J.A. 78 (Edmonson, C.J., specially concurring in part and dissenting in part); J.A. 94-95 (Tjoflat, J., specially concurring in part and dissenting in part).

federal habeas proceedings or in the underlying state court proceeding. That is the wrong test.

First, petitioner's test is unworkable, because every successive petition attacking a state court conviction can be recast as error in the federal court's application of controlling law. Indeed, petitioner proves the point by arguing (Br. 42-44) that Rule 60(b) would be the appropriate vehicle for raising a claim that a death sentence is proscribed by *Atkins* v. *Virginia*, 536 U.S. 304 (2002). Although, under petitioner's approach, that Rule 60(b) motion would no doubt allege a fundamental error in the federal district court's proceedings, its substance would plainly make a frontal assault on the state court judgment. Thus, in practice, petitioner's proposed distinction would open the gate to relitigation of any claim of legal error by the habeas court.[18]

Second, Congress's concern in AEDPA was to restrict the *federal courts'* role in reviewing state convictions. AEDPA's

[18] The potential for abuse is real. See *Abdur'Rahman*, 392 F.3d at 184 (characterizing a procedural default ruling as "defective" because of the "unclear state of the law" at the time the district court ruled); *Hamilton* v. *Newland*, 374 F.3d 822, 824 (9th Cir. 2004) (court treats as a proper Rule 60(b) motion a prisoner's request that the district court "reach the merits of the same constitutional claims he had raised in the original petition," just because the prisoner added an admittedly insubstantial claim of "actual innocence" simply "as a procedural device to avoid the statute of limitations"), cert. denied, No. 04-7992, 2005 WL 517049 (Mar. 7, 2005); *Harris* v. *United States*, 367 F.3d 74, 80 (2d Cir. 2004) (treating failure of privately retained habeas counsel to raise a claim as going to "the integrity of Harris's habeas proceeding"). Petitioner's further suggestion that Rule 60(b) is necessary, in the *Atkins* hypothetical, to save AEDPA from unconstitutionality is unsound. If the scenario petitioner posits of state officials intent on going forward with a facially unconstitutional execution ever arises—and he cites no case where it has—then that will be the appropriate time for the Court to address whether 28 U.S.C. 2244(b)(1) applies to original petitions for habeas corpus in this Court, see *Felker*, 518 U.S. at 662-663, or would otherwise proscribe mandamus relief in those extraordinary circumstances.

res judicata rule thus trains on the federal court judgment itself. See 28 U.S.C. 2244(a) (focusing on whether the legality of detention has been determined once "by a judge or court of the United States"); 28 U.S.C. 2244(b) (regulating second and successive filings based on prior applications to federal courts under federal law). Accordingly, in determining whether a Rule 60(b) motion seeks to avoid AEDPA's restrictions on serial federal review, the controlling consideration is whether the motion challenges the correctness of the prior *federal* court disposition. That is precisely what petitioner's motion does: it falls squarely within AEDPA's text because it seeks reconsideration of the court's prior holding that the asserted claims do not support federal relief. Petitioner's test thus would thwart Congress's purpose to restrict sequential efforts to invoke federal habeas jurisdiction.

C. Petitioner Is Not Entitled To Relief Under Rule 60(b)

Even if the court of appeals erred in characterizing petitioner's Rule 60(b) motion as a second or successive application under Section 2244(b), the Eleventh Circuit's judgment should be affirmed because "[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)." *Agostini* v. *Felton*, 521 U.S. 203, 239 (1997); see also *Liljeberg*, 486 U.S. at 863-864.[19] Nothing in petitioner's case

[19] The court of appeals cases that have granted relief based on intervening law generally have insisted that the change in law be accompanied by extraordinary circumstances. See *Ritter* v. *Smith*, 811 F.2d 1398, 1401-1402 (11th Cir.) (Rule 60(b) relief warranted where a controlling decision of this Court intervened and (1) the judgment had not been executed; (2) there was only minimal delay between the entry of the judgment and the Rule 60(b) motion; and (3) the Court had granted certiorari in the case leading to the change in law specifically to address the court of appeals' decision in the movant's case), cert. denied, 483 U.S. 1010 (1987); *Overbee* v. *Van Waters & Rogers*, 765 F.2d 578, 580 (6th Cir. 1985) (state supreme court reversed itself within one year, and the judgment was not final when the plaintiff filed his Rule 60(b)(6) motion).

transforms *Artuz*'s statutory construction holding into the type of exceptional circumstance that would justify reopening his federal habeas case at this late date. Nor does petitioner make any claim of actual innocence. His guilt is plain, with his claims for relief focused on the length of his sentence.

While petitioner's application for federal habeas was rejected based on a statute of limitations holding that might now be incorrect under *Artuz*, that alone does not satisfy Rule 60(b). Petitioner was afforded a full and fair opportunity to brief the statute of limitations question and to try "to win his case." *Angel*, 330 U.S. at 189. He does not allege any extraordinary defect in or failure in the integrity of the federal court proceedings—there was no fraud or denial of fair notice, and the district court's ultimate disposition was not an unreasonable application of clearly established law. Cf. 28 U.S.C. 2254(d)(1). In the words of petitioner's own amicus (NACDL Br. 17), the alleged mistake of law did "not render erroneous anything about the *process* by which the district court rejected the petition" (emphasis added). Petitioner's reliance on an intervening decision therefore falls outside the ordinary scope of Rule 60(b).

Finally, even if an intervening decision could form a basis for Rule 60(b) relief, petitioner's failure to pursue ordinary corrective processes should disqualify him from that extraordinary remedy. Less than two weeks after petitioner was denied a certificate of appealability by the Eleventh Circuit, this Court granted certiorari in *Artuz*, *supra*, to address the very statute of limitations argument that petitioner now wishes to advance. But petitioner chose not to

pursue relief from this Court.[20] Petitioner had the opportunity to seek relief from the district court's statute of limitations ruling from this Court along with Mr. Bennett. But he was "content to drop [his claims] and let the intermediate adjudication stand. Now he wants an encore." *Angel*, 330 U.S. at 191. AEDPA forbids that, and nothing in the Constitution or federal law justifies invoking Rule 60(b) to permit it.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[20] See note 2, *supra*; *Ackerman*, 340 U.S. at 198 (even where hindsight reveals that a failure to seek further review "was probably wrong," Rule 60(b) is not a mechanism for relieving parties of "free, calculated, deliberate choices"); cf. *O'Sullivan* v. *Boerckel*, 526 U.S. 838 (1999) (discussing state prisoner's general obligation to pursue discretionary review within the state court system); *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 400-401 (1981) (no exception to res judicata principles for parties who fail to preserve their rights through appeal).

STATUTORY APPENDIX

SELECTED PROVISIONS OF 28 U.S.C. CHAPTER 153—HABEAS CORPUS

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color

thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

* * * * *

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be

appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if

the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

* * * * *

§ 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall

discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURT

RULE 9. Delayed or Successive Petitions

(a) DELAYED PETITIONS. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

(b) SUCCESSIVE PETITIONS. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

* * * * *

RULE 11. Federal Rules of Civil Procedure; Extent of Applicability

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.

RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURT

RULE 9. Delayed or Successive Motions

(a) DELAYED MOTIONS. A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

(b) SUCCESSIVE MOTIONS. A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

* * * * *

RULE 12. Federal Rules of Criminal and Civil Procedure; Extent of Applicability

If no procedure is specifically prescribed by these rules, the district court may proceed in any lawful manner not inconsistent with these rules, or any applicable statute, and may apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems most appropriate, to motions filed under these rules.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 60. Relief From Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action

to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

* * * * *

Rule 81. Applicability in General

(a) To What Proceedings Applicable.

* * * * *

(2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions.

* * * * *